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85-1660

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GROUP W CABLE, INC.,
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
AND COX CABLEVISION CORPORATION,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

FLORIDA POWER CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

Nos. 84-3683, 84-3904

United States Court of Appeals,
Eleventh Circuit

Oct. 8, 1985.

Petitions for Review of an Order of the Federal Communications Commission.

Before RONEY and FAY, Circuit Judges, and DUMBAULD*, District Judge.

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*Honorable Edward Dumbauld, U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

PER CURIAM:

This case involves an appeal by Florida Power Corporation (hereinafter "Florida Power") from an Order issued by the Federal Communications Commission (hereinafter "FCC" or "Commission") authorizing certain cable television companies to maintain cable equipment on Florida Power's utility poles at a rate significantly less than that specified in prior contracts between the parties. This Order was issued pursuant to the Pole Attachments Act, 47 U.S.C. § 224 (West Supp.1985).

We conclude that the Order, which mandates a rental rate of less than one-third the agreed upon rates and which in reality precludes Florida Power from excluding the cable companies under any circumstances, amounts to a taking of private property for which just compensation is due under the Takings Clause of the Fifth Amendment. While the FCC's Order did impose a rate which was arguably "just" under the rule prescribed by Congress in the Act, that determination is insufficient for purposes of the Fifth Amendment. Once there has been a taking, the determination of just compensation is a judicial, and not an administrative function. Because the Act does not properly allow for a judicial determination of just compensation, it is in our opinion, unconstitutional. Accordingly, the FCC's Order is hereby vacated.

GENERAL BACKGROUND

Since the advent of cable television in the 1950's, it has become a common practice for the telephone and electric utilities to permit cable television operators to set up their distribution systems by attaching cables and equipment to preexisting pole systems owned and maintained by the utilities. These leasing arrangements typically involve the rental of a portion of the unused space on the pole for an annual fee, as well as reimbursement to the utility for all

costs associated with preparing the pole for the cable attachment.

The petitioner in this case, Florida Power, is no stranger to this industry practice. In 1963, Florida Power entered into such an agreement with Cox Cablevision Corporation (hereinafter "Cox"). Similar voluntary agreements were thereafter entered into by Florida Power with numerous other cable television companies, including Teleprompter Corporation and Teleprompter Southeast, Inc. (hereinafter "Teleprompter"), and Acton CATV, Inc. (hereinafter "Acton").

As the cable television industry began to boom in the 1960's, there was a general aura of discontent among the cable operators regarding their contracts with the telephone and electric power utilities. Undoubtedly the financial, economic and local franchise considerations made the use of preexisting pole networks the most feasible means of establishing a cable system. The cable operators complained, however, that the contracts proposed by the utilities frequently included arbitrarily determined rates as well as standard terms and conditions which were offered on a take-it-or-leave-it basis. Arguably the utilities enjoyed a superior bargaining position over the cable operators by virtue of their monopoly on the ownership and control of these poles.

In the late 1960's, cable companies began to complain that the utilities were exploiting their position by demanding unreasonably high attachment rates. The FCC investigated the allegations but concluded that it lacked jurisdiction because pole attachments did not constitute "communications by wire or radio" within the meaning of the Communications Act, 47 U.S.C. § 151 (1962). *California Water and Telephone Co.*, 64 F.C.C.2d 753, 758 (1977). *See generally* S.Rep. No. 580, 95th Cong., 2d Sess. 12-13 (1978), *reprinted in* 1978 U.S.Code Cong. & Ad.News 109, 120-21.

In the mid 1970's, at the urging of the cable television industry, Congress began to look into these alleged abuses of the utilities' monopoly power. Legislation was introduced and extensive hearings were held to address the issue. Finally, in 1978, Congress passed the Pole Attachments Act, 47 U.S.C. § 224. The Act authorized the FCC, subject to preemption by state regulation, to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1). The Act then sets forth a rule or formula by which the FCC is to determine the "just and reasonable" rate for each particular situation. *See* 47 U.S.C. § 224(d)(1).

In addition, the Act gave the FCC authority to "adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions." 47 U.S.C. § 224(b)(1). In compliance thereof, the FCC issued a series of orders promulgating rules for administering the Act. *See First Report and Order in CC Docket 78-144*, 68 F.C.C.2d 1585 (1978); *Memorandum Opinion and Second Report and Order in CC Docket 78-144*, 72 F.C.C.2d 59 (1979), *aff'd*, *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C.Cir.1981); *Memorandum Opinion and Order in CC Docket 78-144*, 77 F.C.C.2d 187 (1980). In 1981, the United States Court of Appeals for the District of Columbia Circuit upheld the FCC's basic rulemaking decisions, *Monongahela Power*, 655 F.2d 1254, and in 1982, Congress extended the FCC's methodology by indefinitely repealing a "sunset" provision initially contained in the Act. *See* 47 U.S.C. § 224(e) (1978);[1] Conference Report on H.R. 3239, Communications Amendment Act of 1982, 128 Cong. Rec. H6537 col. 3 (daily ed. August 19, 1982). Since the passage of the Act in 1978,

1. The "sunset" provision, 47 U.S.C. § 224(e), initially provided that upon the expiration of the 5-year period that began on February 21, 1978, the provisions of subsection (d) would cease to have any effect. This provision was removed by a 1983 Amendment, Pub.L. 97-259.

the FCC has resolved more than 100 pole attachment cases brought under § 224.

COURSE OF PROCEEDINGS

Availing themselves of the relief provided in the Pole Attachments Act, Teleprompter and Acton complained to the FCC that they were being overcharged by Florida Power under their existing pole attachment agreements. Teleprompter filed its complaint with the Common Carrier Bureau of the FCC on November 18, 1980. Prior to this time, Florida Power had been charging Teleprompter an annual rental rate per pole of $6.24. This rate was agreed to by the parties in a contract dated July 1, 1977. That contract further provided for rates of $6.51 for the year 1981, and $6.79 for the year 1982. Teleprompter's complaint requested the FCC to order a maximum annual rate of $2.23 per pole, to insert that rate into the contract between the parties, and to require Florida Power to refund to Teleprompter all monies paid in excess of that rate, with interest, from the date of the filing of the complaint.[2]

Acton filed its complaint against Florida Power on February 20, 1981. At the time the complaint was filed, Acton was paying Florida Power an annual rental rate of $7.15 per pole pursuant to two contracts between the parties entered into on June 16, 1980. Acton's complaint, which essentially modelled Teleprompter's, requested the FCC to order a maximum annual rate of no more than $2.21 per pole, to insert that rate into the contract between the parties, and to require Florida Power to refund, with interest, all monies

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2. Teleprompter's initial complaint requested a maximum rate of $1.38 per pole. After reviewing Florida Power's response, however, Teleprompter modified its complaint to show a requested rate of $2.23. This revision was obviously prompted by information contained in Florida Power's response about which Teleprompter had no previous knowledge.

paid in excess of that rate after the date the complaint was filed.[3]

Florida Power's response to each of these complaints was essentially the same. The utility contended that the requested relief, if granted, would effect a taking of private property without just compensation in violation of the Fifth Amendment. Florida Power also objected to the complaints on jurisdictional grounds, arguing that the requested relief exceeded the FCC's authority under the Act. Moreover, in regard to Teleprompter's complaint, the utility argued that the relief requested would retroactively nullify a contract predating the effective date of the Act, thus violating the Due Process Clause of the Fifth Amendment. This argument, however, was not made in response to Acton's complaint because the Acton contract was entered into after the Act's effective date.

On July 16, 1981, the FCC's Common Carrier Bureau issued a *Memorandum Opinion and Order* (hereinafter "Teleprompter–Acton Order") responding to the Teleprompter and Acton complaints. The FCC found in favor of the cable companies in both instances and ordered an annual per pole rate of $1.79 for each; $.44 lower than the rate requested by Teleprompter and $.42 lower than the rate requested by Acton.

On August 11, 1981, Florida Power filed an application for review by the FCC pursuant to 47 C.F.R. § 1.115 (1984). While this application was pending, Cox filed its complaint against Florida Power with the FCC. Cox's initial agreement with Florida Power dated back to 1963 and provided for an annual rental rate of $5.50 per pole. In 1978, Florida Power had proposed a new rate of $6.86. The parties were unable to reach an agreement on this issue so Florida Power invoked a contractual provision authorizing a higher rate

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3. Acton's complaint initially requested a maximum rate of $2.23 per pole. After reviewing Florida Power's response, however, Acton also modified its complaint to show a requested maximum rate of $2.21 per pole.

under such circumstances. Cox, however, continued to pay at the previous rate of $5.50 per pole. Florida Power responded by suspending Cox's rights under the contract. Nonetheless, the initial contract was still in effect when Cox filed its complaint against Florida Power.

On March 8, 1982, the Common Carrier Bureau issued a *Memorandum Opinion and Order* (hereinafter "Cox Order") granting Cox's request for imposition of a rate of $1.79 per pole. The substance of the Cox Order was virtually identical to the Teleprompter-Acton Order. Due to the contract dispute between the parties, however, this order did not grant a refund to Cox. Florida Power subsequently filed an application for review of the Cox Order with the FCC.

On September 28, 1984, more than three years after Florida Power filed its application for review of the Teleprompter-Acton Order, and more than two years after its application for review of the Cox Order was filed, the FCC, in a single order (hereinafter "Order"), denied both applications. The FCC's Order rejected Florida Power's constitutional arguments under the Takings and Due Process Clauses and in general language upheld all of the Common Carrier Bureau's decisions bearing on rate calculation.

Florida Power petitioned this court for review of the FCC's Order on October 5, 1984. Intervenors on behalf of Florida Power included Tampa Electric Company, Mississippi Power and Light Company and Alabama Power Company. The FCC, as respondent, received support on appeal from a number of intervening cable television companies, including Acton, Cox, and Group W Cable, Inc., the successor in interest to Teleprompter.

THE APPLICABLE CASE LAW

Florida Power argues that the FCC's Order mandating an annual per pole rate of $1.79 in the case of Teleprompter, Acton and Cox amounted to a taking of property without just compensation in contravention of the Fifth Amendment.

In support of its argument, Florida Power relies primarily on the United States Supreme Court decision of *Loretto v. Teleprompter-Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). *Loretto* involved a New York statute which provides that a landlord must permit a cable television company to install cable components upon his property in return for an amount determined to be reasonable by the State Commission. Pursuant to that statute, the Commission had ruled that a one-time $1 payment was reasonable. The appellant, Jean Loretto, had purchased a five story apartment building in New York City and afterwards discovered cable equipment already in place along the building's exterior walls. Ms. Loretto thereafter brought a class action suit for damages and injunctive relief, alleging *inter alia*, that the installation constituted a taking without just compensation. The New York courts rejected Loretto's argument and denied the requested relief.

On appeal, the United States Supreme Court held that the New York statute requiring a landlord to permit the installation of cable television facilities upon her property at a government-fixed rate worked a taking of that property requiring just compensation under the Fifth Amendment. In reaching this conclusion, the Supreme Court deemed applicable the traditional rule that "a permanent physical occupation of another's property is a taking." *Id.* at 435, 102 S.Ct. at 3175. After a thorough discussion of the general principles governing the Takings Clause, the Court concluded:

> Teleprompter's cable installation on appellant's building constitutes a taking under the traditional test. The installation involved a direct physical attachment of plates, boxes, wires, bolts and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall.

Id. at 438, 102 S.Ct. at 3177. The Court thereafter remanded for state court consideration the issue of the amount of compensation due.

The FCC contends that *Loretto* is not even remotely applicable to the instant case. They base this contention on what they perceive to be significant differences between the circumstances in *Loretto* and those in the case at hand. According to the FCC, the Supreme Court's conclusion that there was a taking in *Loretto* is based upon two factors: (1) there was an uninvited access to the property of the landlord by the cable company, and (2) the cable company's components constituted a permanent physical occupation of the landlord's property. These factors, the FCC argues, are not present in the instant case.

In regard to this argument, we have no disagreement with the FCC's interpretation of the factors underlying *Loretto*. What troubles this court, however, is the attempt to distinguish *Loretto* by arguing that the factors underlying that decision are non-existent in the case of Florida Power.

The FCC points out that *Loretto* and the cases cited therein all involved what the FCC has termed an *uninvited access* to property. That factor, the FCC argues, is not present in the Florida Power case because Florida Power knowingly and voluntarily contracted with the cable companies for the installation of the cable network. Therefore, the FCC contends, the access to the poles was *invited*, not uninvited, and *Loretto* and its predecessors do not apply.

Assuming for the moment that Florida Power's actions can be construed as an invitation to access its poles, it is nonetheless clear that that invitation was made subject to and based upon certain conditions, namely the agreed upon annual per pole rate. To the extent the cable companies complied with the terms of their agreements, their occupation might well be construed as invited. But by insisting on a significantly lower rate, the cable companies have themselves transformed their status from that of an invitee, to use their own terms, to that of an unwanted guest. While they may have been invited at the outset, they certainly weren't invited at the rate imposed by the FCC. In our opinion, the cable companies' occupation of Florida Power's

poles at the rate specified by the FCC is anything but invited.

The FCC, however, carries the argument a step further. It claims that although Florida Power would naturally prefer the higher rates, it still welcomes the cable companies' presence even at the new lower rates. According to the FCC, this is evident from the fact that Florida Power has taken no steps to exclude the cable companies. Therefore, the FCC argues, the cable companies' presence can still be construed as invited and *Loretto* does not apply.

In our opinion, this argument simply ignores reality. The hard reality of the matter is that if Florida Power desires to exclude the cable companies, for whatever reason, they are powerless to do so. We say this because in previous cases where utilities have ordered cable companies to disconnect, the FCC has routinely intervened by issuing temporary stays which prevent the exclusion of the cable companies. *See Whitney Cablevision v. Southern Indiana Gas & Electric Co.*, Mimeo 841 (Nov. 16, 1984); *Tele-Communications, Inc. v. South Carolina Electric & Gas Co.*, Mimeo 5957 (Aug. 16, 1983). Thus we can predict with some confidence what the FCC's response would be should Florida Power attempt to do the same.[4] The fact that Florida Power has not undertaken what obviously would be a futile attempt at excluding the cable companies is by no means an indication that Florida Power invites or even accepts the cable companies' presence at the FCC-imposed rates.

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4. The FCC contends that *Whitney*, Mimeo 841, and *TeleCommunications*, Mimeo 5957, should not be relied upon as indicators of how the FCC would respond should Florida Power try to exclude the cable companies. According to the FCC, the issuance of the temporary stays in those two cases was necessary to prevent "retaliatory" action by the utilities involved. It is difficult for us to imagine, however, how Florida Power, or any utility for that matter, could issue a disconnect order under such circumstances and have it escape being deemed retaliatory by the FCC. Consequently, the FCC's argument on this matter is unpersuasive.

Consequently, we conclude that *Loretto* is not distinguishable from the instant case on the basis of uninvited access. We therefore turn to the FCC's second argument as to why *Loretto* does not apply.

The FCC contends that *Loretto* is not applicable to the Florida Power situation because Florida Power is not faced with a *permanent* physical occupation by the cable companies. It is not permanent, argues the FCC, because the physical occupation is pursuant to a contract for a term of years and can thereafter be terminated. For the reasons which follow, we reject this argument.

First of all, the FCC's argument presupposes that when the cable companies' contracts expire, Florida Power will be free to refuse to renew those agreements. As we intimated earlier, however, we have no doubt that Florida Power would face considerable difficulty in trying to exclude the cable companies. This holds true regardless of whether the disconnect order is issued prior to or after the expiration of the contract period. In fact the FCC has made it quite clear that it intends to require continued provision of space at FCC-ordered rates. In anticipation of such events, the FCC has stated: "Even where there is currently no [cable television] attachment or agreement thereof, the Commission has jurisdiction if: (1) there is communication space designated on the poles and (2) the utility has discontinued [cable television] attachment in order to avoid such Commission jurisdiction." *First Report*, *supra*, 68 F.C.C.2d at 1589. In terms of permanency then, the fact that this physical occupation is pursuant to a contract for a term of years is by no means proof that the physical occupation will cease at any particular time.

In any event, this distinction is overstated and in our opinion irrelevant. It is apparent from *Loretto* that when the Court speaks in terms of a permanent physical occupation, it does not necessarily mean that the occupation is one which will last forever. In fact the Court noted that the property owner in *Loretto* could force the cable company to

disconnect at any time by simply occupying the building herself, or by converting it to commercial property. 458 U.S. at 439 and n. 17, 102 S.Ct. at 3178 and n. 17. Florida Power on the other hand, must at the very least wait until the contracts expire, and even then it is doubtful whether Florida Power would be able to exclude the cable companies. Consequently, the extent of the occupation in the case of Florida Power not only satisfies *Loretto's* permanency requirement, but significantly exceeds it.

The crux of the matter then is that the FCC's emphasis on the extent of the occupation is misplaced. *Loretto* indicates that in resolving the taking issue, the focus should be placed not on the extent of the occupation, but rather on the nature of the physical attachment itself:

> [W]hether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute. Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due. For that reason, moreover, there is less need to consider the extent of the occupation in determining whether there is a taking in the first instance.

Id. at 437-38, 102 S.Ct. at 3177 (emphasis in original). In regard to the physical attachment then, *Loretto* and the instant case are virtually indistinguishable; they both involve the placement of plates, boxes, wires, bolts and screws upon the property of a reluctant owner. Moreover, to the extent that a permanent physical occupation includes some element of permanency, we conclude that the instant case satisfies that element as set forth in *Loretto.*

For the aforementioned reasons, we conclude that the instant case is not distinguishable from *Loretto* on the basis of either uninvited access or permanency of the occupation. *Loretto* therefore controls, and based on that decision, we

hold that the FCC's Order effected a taking of Florida Power's property.

THE JUST COMPENSATION ISSUE

Having concluded that the FCC's Order worked a taking of Florida Power's property, the next issue which naturally arises concerns the amount of compensation due. Florida Power argues that in mandating a rental rate of less than one-third the rates originally agreed upon, the FCC has deprived it of just compensation in violation of the Fifth Amendment. While this may or may not be true, it is our opinion that an even more fundamental question must first be addressed: Does the FCC, an administrative agency, have the power to determine what is or is not just compensation for purposes of the Fifth Amendment Takings Clause? In our opinion, it does not.

It appears to this court that the determination of what constitutes just compensation is a decision which has been jealously guarded as being solely within the parameters of the judicial function. For example, in the early case of *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893), the Supreme Court had the opportunity to address this issue. In *Monongahela*, Congress had enacted legislation which authorized the Secretary of War to negotiate for, or in the alternative to take, a lock and dam located on the Monongahela River, and to pay the owner of that lock and dam, the Monongahela Navigation Company, a purchase price not in excess of $161,733.13. As regards the just compensation issue, the Court stated:

> By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the

> public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

Id. at 327, 13 S.Ct. at 626. The Court then went on to quote with approval the following language from the Mississippi Supreme Court's decision in *Isom v. Mississippi Central R.R.*, 36 Miss. 300 (1858):

> The rights of the legislature . . . to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or *in any manner* to interfere with the just powers and province of courts and juries in administering right and justice cannot for a moment be admitted or tolerated under our Constitution. If anything *can be* clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so.

Monongahela, 148 U.S. at 327-28, 13 S.Ct. at 627 (emphasis in original) (quoting *Isom*, 36 Miss. at 315).

More recently, several United States Court of Claims decisions have relied on *Monongahela* in striking down legislatively imposed standards for just compensation. For example, in *Miller v. United States*, 620 F.2d 812, 223 Ct.Cl. 352 (1980), the United States effected a taking of some 2,646 acres of timberland for inclusion in the Redwood National Forest. While the parties at trial stipulated to the fair market value of the timberland, a question remained concerning the interest rate which should apply to the delay in payment of just compensation. Prior to this taking, Congress had enacted legislation which mandated that a 6%

interest rate was an appropriate rate of interest to cover such delays. The Court of Claims, however, relying on *Monongahela*, held that the 6% rate was not binding on the court. *Id.*, 620 F.2d at 837. The court stated that "the determination of just compensation under the fifth amendment is exclusively a judicial function," and that "[i]t does not rest with Congress to say what compensation shall be paid, or even what shall be the rule of compensation." *Id.* *See also United States v. 15.3 Acres of Land*, 154 F.Supp. 770, 783 (M.D.Pa.1957) (ascertainment of just compensation is a judicial function and no power exists in any other department of government to declare what the compensation shall be or to prescribe any binding rule in that regard).

In another Court of Claims decision, *American-Hawaiian Steamship Co. v. United States*, 124 F.Supp. 378, 129 Ct.Cl. 365 (1954), *cert. denied*, 350 U.S. 863, 76 S.Ct. 103, 100 L.Ed. 766 (1955), the United States War Shipping Administration (hereinafter "WSA") effected a taking of a privately owned steam freighter for military use during World War II. The WSA derived its authority for such takings from the Merchant Marine Act of 1936, 46 U.S.C.A. 1242. Pursuant to this Act, the WSA issued General Order No. 37, which fixed a basic bareboat charter rate of $1.25 per deadweight ton per month for such vessels. As in *Miller*, the Court of Claims held that it was not bound by the WSA imposed rate, and that $2.50 per deadweight ton per month was "just" to both parties. *American-Hawaiian*, 124 F.Supp. at 384. In reaching this conclusion, the court stated:

> The ascertainment of just compensation is not an administrative but a judicial function; no power exists in any administrative agency of the Government to declare what that compensation should be or to prescribe any binding rule in that regard.

Id. at 382-83 (citing *Monongahela*, 148 U.S. at 327, 13 S.Ct. at 626).[5]

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5. In holding as it did, the Court of Claims emphasized that the constitutional requirement that the government must pay just

The Pole Attachments Act clearly runs afoul of the principles set forth in the Fifth Amendment and in the aforementioned cases. Section (d)(1) of the Act provides as follows:

> (d) Determination of just and reasonable rates; definition
>
> (1) For purposes of subsection (b) of this section, *a rate is just and reasonable* if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C § 224(d)(1) (emphasis added). By prescribing a "binding rule" in regard to the ascertainment of just compensation, Congress has usurped what has long been held an exclusive judicial function. *See Monongahela*, 148 U.S., at 327, 13 S.Ct. at 626; *Miller*, 620 F.2d at 837; *U.S. v. 15.3 Acres*, 154 F.Supp. at 783; *American-Hawaiian*, 124 F.Supp. 382-83. As the Supreme Court held in *Monongahela*, such interference "with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution." *Monongahela*, 148 U.S. at 327-28, 13 S.Ct. at 627. Because the Act does not allow for a judicial determination of what constitutes just compensation, it is in this court's opinion, unconstitutional.

CONCLUSION

The FCC's Order authorizing cable operators to occupy space on Florida Power's poles effected a taking of property

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compensation for what it takes for public use is one which war does not suspend, alter or modify. *American-Hawaiian*, 124 F.Supp. at 382.

for which just compensation is due. The determination of just compensation, however, was constitutionally inadequate in this case because it was made by an administrative agency at the behest of Congress rather than by judicial inquiry as required by law. The Pole Attachments Act, pursuant to which this Order was issued, does not properly allow for a judicial determination of just compensation, but instead prescribes a rule by which the FCC is to determine the maximum allowable rates. For the legislature to take the property of a person and then to constitute itself the judge in its own case, to determine what is "just compensation," offends our most fundamental principles of natural justice and constitutional law. The determination of just compensation is clearly a judicial function. To the extent that this Act deviates from this well-established principle, we hold it unconstitutional.[6]

This holding, of course, relates to the taking by the federal government, which regulates cable television. We express no opinion whatsoever as to any issues that might be raised if a state agency charged with the responsibility of regulating the power company as a public utility sought to exercise some control or rate-making procedures concerning attachments to the company's utility poles.

The FCC's Order is, therefore, VACATED.

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6. Florida Power also raises the issue of whether the Order, insofar as it abrogated contracts in existence prior to the effective date of the Pole Attachments Act, deprived Florida Power of property without due process of law contrary to the provisions of the Fifth Amendment. In light of our disposition of appellant's taking claim, we see no need to address this contention.

We also note that had we not found that the FCC's Order constituted a taking, we would have been compelled to address the alternative argument of Florida Power, that being whether the rate calculated by the FCC was arbitrary and capricious. This of course, would have entailed a different standard of review altogether. In such cases, the focus is, as Florida Power points out, whether the Order is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A) (1977).

APPENDIX B

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 84-419
35068

In the Matter of	)	
	)	
Teleprompter Corporation and Teleprompter Southeast, Inc.,	)	
	)	
Complainants	)	
	)	
v.	)	File No. PA-81-0008
	)	
Florida Power Corporation,	)	
	)	
Respondent	)	
	)	
In the Matter of	)	
	)	
Acton CATV, Inc., d/b/a Brookville Properties Venture and Pasco Associates Venture,	)	
	)	
Complainants	)	
	)	
v.	)	File No. PA-81-0023
	)	
Florida Power Corporation	)	
	)	
Respondent	)	
	)	
In the Matter of	)	
	)	
Cox Cablevision Corp. d/b/a Highland Cable TV,	)	
	)	
Complainant	)	
	)	
v.	)	File No. PA-82-0005
	)	
Florida Power Corporation,	)	
	)	
Respondent	)	

MEMORANDUM OPINION AND ORDER

Adopted September 10, 1984 ; Released September 28, 1984

By the Commission:

1. The Commission has before it two applications by Florida Power Corporation ("FPC") for review of two Common Carrier Bureau Orders, involving three individual complaints, which found FPC's pole attachment rates unjust and unreasonable under Section 224 of the Communications Act, 47 U.S.C. §224. *Teleprompter Corp. v. Florida Power Corp.*, Mimeo No. 001980 (released July 16, 1981) (*Teleprompter*); *Cox Cablevision Corp. v. Florida Power Corp.*, Mimeo No. 2639 (released March 8, 1982) (*Cox*) (Collectively, *Orders*).[1] FPC alleges error in certain calculations made by the Bureau in its determination of the two rates and questions the validity of the Commission's 13.5-foot usable space figure and its use of a 15-percent deduction in calculating the net cost of a bare pole. The utility claims that these alleged errors resulted in rates below what is just and reasonable and it seeks modification of the *Orders* accordingly. Further, FPC maintains that the holdings in *Teleprompter* and *Cox* violate the fifth amendment of the United States Constitution and exceed the authority granted to the Commission under the Pole Attachment Act, 47 U.S.C. §224, because the orders abrogate contracts which predate enactment of the Act and grant relief which, in effect, constitutes a taking without just compensation.[2] The CATV operators

[1] The two applications for review are substantially identical and Teleprompter and Cox have filed similar responses. As such, we can appropriately consolidate the two applications and make uniform findings.

[2] FPC subsequently filed a "Motion for Leave to File" and a "Supplemental Submission" which addressed a recent Supreme Court decision, discussed in paragraph 4, below. We grant the motion and accept the supplement.

support the Bureau's *Orders* and urge denial of the applications.

2. *Calculations of the Maximum Rate.* We have fully reviewed FPC's contentions regarding the Bureau's computations of the maximum just and reasonable rates and find no reason to disturb the rationale or result of the Bureau's determinations. FPC has not provided any arguments which would form a basis for reaching any different result, but rather has repeated arguments which have been addressed at length and disposed of in these and other orders. *See e.g. Teleprompter Corporation and Teleprompter Southeast, Inc. v. Florida Power and Light,* FCC 83-562 (released December 5, 1983); *Petition to Adopt Rules Concerning Usable Space on Utility Poles* (RM 4558), FCC 84-325 (released July 25, 1984).

3. *Jurisdictional and Constitutional Arguments* The utility's argument that the abrogation of an existing contract exceeds the Commission's authority was properly considered and rejected in the Order below, and we find no reason to revise the Bureau's determination. *See also Monongahela Power Co. v. Federal Communications Commission,* 655 F.2d 1254 (D.C. Cir., 1981) which upheld the authority of the Commission to exercise jurisdiction over pole attachment agreements entered into prior to the effective date of Section 224 of the Act. Turning to the constitutional issues, we are not persuaded by FPC's arguments. FPC contends that the Pole Attachment Act violates the due process clause of the fifth amendment because it impairs the obligation of contracts existing prior to the enactment of the Act. In essence, it argues that the Due Process Clause should be construed to incorporate a contract clause comparable to that found in article I, section 10, of the United States Constitution and that Contract Clause scrutiny should therefore be applied in analyzing the constitutionality of the Pole Attachment Act. We need not actually make this determination, however, since the Contract Clause by its

terms applies only to state, not federal, enactments.[3] Moreover, the Supreme Court has never held that the principles embodied in the fifth amendment Due Process Clause are coextensive with prohibitions existing against state impairment of pre-existing contracts. *See, Pension Benefit Guaranty Corp. v. R. A. Gray & Co.* _____ U.S. _____, 104 S. Ct. _____, 80 L. Ed. 2d _____ (52 U.S.L.W. 4810, June 18, 1984). In *Gray*, the court considered whether applying liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 to employers withdrawing from pension plans during a five month period prior to the enactment of the statute violated the Due Process Clause of the fifth amendment. In determining that the Act did not violate the fifth amendment, the Court set aside suggestions that it apply constitutional principles developed under the Contract Clause and stated that " . . . to the extent that recent decisions of the court have addressed the issue, we have contrasted the limitations imposed on states by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clause." *Id.* at 4814. Moreover, the court added that " . . . although [it had] noted that retrospective civil legislation may offend due process if it is particularly 'harsh and oppressive' . . . . that standard does not differ from the prohibition against arbitrary and irrational legislation that [it] clearly enunciated in *Turner Elkhorn.*" *Id.* In that case (*Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)), the Court, considering a constitutional challenge to the retroactive effects of a federal statute, noted:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish the legislature has acted

[3] Article I, Section 10, Clause 1 of the United States Constitution provides that "[N]o state shall . . . pass any bill of attainder, ex post facto law or law impairing the obligation of contract . . . .".

> in an arbitrary and irrational way. See, *e.g.*, *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-488 (1955). 428 U.S., at 15.

In this regard we note that FPC fails to point to any evidence whatever that Congress acted in an "arbitrary and irrational way" in enacting the Pole Attachment Act. Nor has the petitioner offered evidence to overcome the determination in *Monongahela Power* that the Commission properly interpreted legislative intent in exercising its authority under the Act to abrogate existing contracts. 655 F.2d at 1256.

4. Notwithstanding the above, however, application of Contract Clause standards to the Pole Attachment Act plainly reveals that the Act violates neither the Contract Clause nor the less stringent standards of the Due Process Clause.[4] Unlike the statute at issue in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), cited by the utility in support of its contention that the Bureau's action is contrary to the fifth amendment, the Act does not effectuate "substantial" and "severe" impairments of a contractual relationship. 438 U.S. at 244-46.[5] Thus, applying standards

[4] *See, Peick v. Pension Benefit Guaranty Corp.*, 724 F. 2d 1247(7th Cir. 1983) (indicating that while by no means coextensive the mode of analysis under the Due Process Clause closely parallels Contract Clause principles); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979) (indicating that if legislation survived the scrutiny of the Contract Clause, it would survive the less searching standards imposed on legislation by the Due Process Clause).

[5] The mere fact that a preexisting contract has been abrogated is insufficient of itself to constitute a violation of the Contract Clause. *See e.g., Jones v. Lynn*, 477 F.2d 885 (1st Cir. 1973); *Minnesota Gas Co. v. Public Service Commission*, 523 F. 2d 581 (8th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976); *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U.S. 372 (1919). Rather, the issue is whether the statute unreasonably impairs contractual obligations. *Spannaus* at 244-245. In making this determination, the Supreme Court has enumerated several factors that are to be considered: (i) whether the statute at issue effects a

developed in *Spannaus*, we note that the Pole Attachment Act operates prospectively and contract terms are altered only to the extent of services supplied subsequent to its enactment. Indeed, the Commission adjusts only those charges accruing after the filing of a complaint. *Spannaus*, on the other hand, found unconstitutional a statute which mandated that a company undertake, retroactively, heavy financial burdens in addition to those it had contracted to assume. *Id.* at 246-247. Further, FPC cannot reasonably argue that modification could not have been anticipated. It is well established that contracts made in areas of governmental regulation are subject to modification by subsequent legislation. *See, Veix v. Sixth Ward Bldg. & Loan Ass'n;* 310 U.S. 32 (1940). Indeed, the Supreme Court has held that "[t]hose who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *FHA v. Darlington, Inc.* 358 U.S. 84, 91 (1958). The ability of Congress to react to changing conditions and to legislate in the public interest cannot be restricted by private agreements. *Producers Transportation Co. v. Railroad Commission of California*, 251 U.S. 228, 232 (1920). "Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution." *FHA v. Darlington, Inc.*, 358 U.S. at 91. Nor has FPC shown that modification of contracts under the Pole Attachment Act occurs in areas upon which it relies heavily or in which its interests are considered vital since the revenue associated with such contracts is *de minimis* to the utility and its ability to provide electric service to its customers is not impaired in any way by the contractual terms. In light of the above, the Pole Attachment Act cannot be said to be either "arbitrary or irrational" or to operate in a manner

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substantial modification of contracts, (ii) whether the modification has a retroactive effect, (iii) whether the modification could have been anticipated, and (iv) whether the modification occurred in an area where the element of reliance is vital. *Id.* at 246.

which substantially and severely impairs contractual relationships.

5. Further, FPC maintains that, under the doctrine of *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419 (1982), any Commission-ordered abrogation of its bargained-for pole attachment contracts would be a forced taking of property without just compensation and due process of law in violation of the fifth amendment of the United States Constitution. It contends that the bargained-for rate contained in the contracts is the least amount that can be considered reasonable compensation for such a taking. However, a Commission-ordered abrogation of a contractual pole attachment rate is inapposite to a taking under the *Loretto* doctrine, which addressed a physical occupation without any compensation. Congress, in enacting Section 224, recognized the unequal bargaining position of the parties in these situations and empowered the Commission to act as arbiter in determining what is just, reasonable, and fair compensation and, if necessary, cancel unreasonable contract provisions. S. Rep. No. 95-580, 95th Cong. 1st Sess. 14 (1977). Moreover, the Commission's complaint procedures provide all parties an opportunity to be heard. Therefore, FPC is not being deprived of property without just compensation or without due process of law.

6. Accordingly, IT IS ORDERED, That the applications for review filed by Florida Power Corp. ARE DENIED.

7. IT IF [*sic*] FURTHER ORDERED, That the Motion for Leave to File IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX C

Before the
Federal Communications Commission
Washington, D.C. 20554

2639

In the Matter of	)	
	)	
Cox Cablevision Corp. d/b/a Highlands Cable TV	)	
	)	
Complainant	)	
	)	
v.	)	File No. PA-82-0005
	)	
Florida Power Corporation	)	
	)	
Respondent	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: March 4, 1982; Released: March 8, 1982

By the Chief, Common Carrier Bureau:

1. Before the Bureau, pursuant to delegated authority, is a complaint filed under Section 224 of the Communications Act, 47 U.S.C. §224, by Cox Cablevision Corp. d/b/a Highlands Cable TV (Cox) alleging that Florida Power Corporation (FPC) has imposed unjust and unreasonable rates for cable television pole attachments. That section empowers the Commission to adjudicate attachment rate disputes between cable television system operators and telephone and electric utilities. After consideration of the pleadings,

we conclude that FPC in fact charges unjust and unreasonably high rates, but that a refund is not warranted at this time.

Background and Contentions of the Parties

2. Cox owns and operates cable television systems serving the communities of Avon Park, Sebring and unincorporated areas of Highlands and Marion County, Florida. Pursuant to a contract with FPC, Cox has attached distribution facilities to the utility's poles.

3. Using information produced initially by FPC or developed by the Commission in resolving other complaints against FPC, and applying the formula established by Section 1.1409(c) of the Commission's Rules, 47 C.F.R. §1.1409(c), Cox calculates that the maximum just and reasonable rate is $1.79 per attachment. It therefore urges us to substitute this lower rate for the $5.50 rate that it is presently paying, and further, to order appropriate refunds.[1]

4. FPC, for its part, challenges the complaint on jurisdictional and procedural grounds and denies the validity of the

[1] In 1978, FPC presented Cox with a proposed rate increase from $5.50 to $6.86. Despite lengthy negotiation over the proposed new rate, the parties failed to reach an agreement. On March 20, 1979, FPC suspended Cox's rights insofar as additional pole attachments are concerned. Moreover, from the date of suspension through the most recent semi-annual invoicing, FPC has charged Cox in accordance with §8.1 of their operating contract, a provision governing rates in the event of a dispute over an increase. Under this provision, FPC began charging Cox $11.47 per pole attachment. Cox has, however, rejected this rate and continues to pay FPC $5.50 per pole.

$1.79 per pole rate calculated by Cox.[2] It argues not only that the $5.50 rate is reasonable but that a rate of $16.94 per pole would be fair and just. Moreover, respondent claims that as a result of a contractual violation, Cox now owes FPC $40,783.73, excluding interest, and that this should be considered in any rate adjustment or refund that might be ordered.[3]

5. Section 1.1409(c) of the Commission's Rules, 47 C.F.R. §1.1409(c), provides that the maximum "just and reasonable" rate for pole attachments is to equal the percentage of the total usable space occupied by the pole attachment times the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole. This rule, expressed as a formula, is as follows:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times (\text{Operating Expenses} + \text{Capital Costs of Poles})$$

In the instant case, the parties [*sic*] dispute centers on all of these elements.

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[2] FPC preliminarily argues that the Commission lacks jurisdiction to alter pole attachment contracts entered into voluntarily prior to the effective date of Section 224. The Commission, however, has previously determined that it does have this authority and we need not explain the rationale once again. *See First Report and Order in CC Docket 78-144*, 68 FCC 2d 1585, 1591 (1978), *aff'd on recon., Second Report and Order in CC Docket No. 78-144*, 72 FCC 2d 59, 67 (1979) ("*Second Report*"), *aff'd sub. nom. Monongahela Power Company* v. *Federal Communications Commission*, No. 80-1390 (D.C. Cir., May 15, 1981) ("*Monongahela Power*").

[3] The $40,783.73 alleged debt figure is the difference, calculated over a two-year period, between the $5.50 rate that Cox is presently paying and the $11.49 rate that FPC is currently charging per pole attachment.

6. *Total Usable Space and Space Occupied by CATV.* Complainant's arguments regarding usable pole space and space occupied by CATV are substantially identical to those in *Cable Information Services, Inc.* v. *Appalachian Power Company*, 81 FCC 2d 383 (1980). (*"C.I.S."*). Cox has used 13.5 feet as the average usable space figure and twelve inches as the space occupied by CATV. These figures comport with the Commission's rules and prior decisions. FPC, on the other hand, argues that the Commission has misconstrued Congressional intent and urges the Commission to revise its usable space policies so as to avoid rates which are neither just nor reasonable. Indeed, it suggests that the usable space factor ought not be considered. Rather, FPC contends that a fair and reasonable rate is one that reflects the cost of attachments to a CATV system owning its own poles. FPC's contention notwithstanding, we have determined previously that for the purposes of the rate formula, in the absence a [*sic*] substantiated pole height study, we will use 13.5 feet as the average usable space figure, and the space occupied by CATV is one foot.[4] There is no need to repeat the Commission's rationale for using these figures in the rate formula.

7. *Operating Expenses and Capital Costs of Poles.* The final formula element to be determined is operating expenses and capital costs of poles. Although operating expenses and capital costs of poles (also known as "carrying charges) [*sic*] can be expressed directly as dollar amounts, these costs may also be expressed as a percentage of net pole investment. Section 1.1404(g)(9), 47 C.F.R. §1.1404(g)(9). Thus, the operating expenses and capital costs of poles normally are determined from the net cost of a bare pole and the carrying charges attributable to the cost of owning a pole.

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[4] *Second Report, Monongahela Power, supra* n. 2.

8. *Net Cost of a Bare Pole, Carrying Charges, and Maximum Rate.* The figures submitted by the parties to justify their calculations of the net cost of a bare pole, the carrying charges, and the maximum just and reasonable rate, and the arguments advanced to support their figures, are identical to those contained in the pleadings in another complaint against FPC. See *Teleprompter Corp.* v. *Florida Power Corp.*, Mimeo No. 001980 (released July 16, 1981) (hereinafter *Teleprompter*). In that case the Commission determined that based on 1980 year-end data, the maximum just and reasonable rate FPC may charge per pole attachment per annum is $1.79.[5] The parties have submitted no new data which would require reexamination of that finding. The conclusion is inescapable, therefore, that FPC's rates of $5.50 and $11.47, are unjust and unreasonable within the meaning of Section 224 of the Communications Act, 47 U.S.C. §224, and the underlying rules.[6]

9. After making a determination, based upon a complaint and responsive pleadings, that an existing pole attachment rate is unjust and unreasonable, it is our responsibility to fashion a suitable remedy. Where the amount of the overcharge has been substantial, it has generally been our policy to order refunds of the overpayments (with interest) commencing from the date the CATV operator filed the complaint. While we have determined that the maximum just

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$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times \text{Cost of a Bare Pole} \times \text{Carrying Charges}$$

$$\text{Maximum Rate} = \frac{1}{13.5} \times \$95.91 \times 25.236\% = \$1.79$$

This finding by the Commission is based on 1980 year-end data, the most recent data availabie. This decision, however, does not preclude future rate negotiations between the parties based on the availability of more recent data.

6 See generally, n. 1, *supra.*

and reasonable rate in this proceeding is less than that currently being charged by FPC, we are not persuaded to order a refund at this time. There appears to be a dispute as to whether Cox may owe additional monies for attachments in existence prior to November 2, 1981, the date it filed its complaint. While the Commission's jurisdiction does not extend to adjudication of the extent of a party's contractual obligations, we may, in taking remedial action, consider the fact that there appears to be a bona fide contractual dispute over the issue of monies owned [*sic*] for service received.[7] Under these circumstances a refund order would be premature. Instead, we will allow the parties an opportunity to first resolve their disputes. If such resolution does not ultimately take into account any overpayment Cox may have made since November 2, 1981, we will grant complainant leave to return to the Commission to request appropriate action regarding the refunding of overcharges.

Ordering Clauses

10. Accordingly, IT IS ORDERED, pursuant to Sections 0.291 and 1.1401-1413 of the Commission's Rules, 47 C.F.R. §§.291 and 1.1401-1413, That the complaint of Cox IS GRANTED to the extent indicated above.

11. IT IS FURTHER ORDERED, pursuant to Sections §0.291 and 1.1410(a) of the Commission's Rules, 47 C.F.R. §§0.291 and 1.1410(a) That the existing annual rate of $5.50

[7] FPC requests that if the Commission determines its rates are unjust, it be given authority to conduct discovery as to the likely effects of the remedies sought by Cox, and that copies of any final action be served on local franchising authorities. FPC has presented no compelling reasons for granting these procedural requests, which are not contemplated by the rules, and therefore, they are denied.

or $11.47 for each pole attachment arising out of the agreement between FPC and Cox IS TERMINATED, effective upon the release of this Order.

12. IT IS FURTHER ORDERED, pursuant to Sections 0.291 and 1.1410(b) of the Commission's Rules, 47 C.F.R. §§0.291 and 1.1410(b), That an annual rate of $1.79 for each pole attachment IS SUBSTITUTED for the existing rates in the contract described in paragraph 11, effective upon release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Illegible for

Gary M. Epstein
Chief, Common Carrier Bureau

APPENDIX D

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	001980
	)	
Teleprompter Corporation and Teleprompter Southeast, Inc.,	)	
	)	
Complainants	)	
	)	
v.	)	File No. PA-81-0008
	)	
Florida Power Corporation,	)	
	)	
Respondent	)	
	)	
In the Matter of	)	
	)	
Acton CATV, Inc., d/b/a Brookville Properties Venture and PASCO Associates Venture,	)	
	)	
Complainants	)	
	)	
v.	)	File No. PA-81-0023
	)	
Florida Power Corporation,	)	
	)	
Respondent	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: July 2, 1981 ; Released: July 16, 1981

By the Acting Deputy Chief (Operations), Common Carrier Bureau:

1. Before the Bureau, pursuant to delegated authority, are two joint complaints filed under Section 224 of the Communications Act, 47 U.S.C. §224, against Florida Power Corporation (FPC). Complainants collectively allege that FPC has imposed unjust and unreasonable rates for cable television pole attachments. Section 224 empowers the Commission to adjudicate disputes between cable television system operators and telephone and electric utilities concerning alleged unjust or unreasonable attachment rates, terms or conditions. These two complaints are virtually identical in their analysis and arguments and FPC has filed uniform responses. Therefore, we may, in one order, make uniform findings as to the just and reasonable rates. For reasons to be explained, we conclude that FPC is charging unjust and unreasonably high rates and, moreover, that refunds are warranted.

2. Complainants own and operate cable television systems serving communities in Florida. Pursuant to contracts with FPC, they have attached distribution facilities to the utility's poles, and they pay rates annually under the terms of the contracts.[1]

3. Using information provided by FPC and applying the formula established by Section 1.1409(c) of the Commission's Rules, 47 C.F.R. §1.1409(c), the operators calculate the maximum just and reasonable annual rate is $2.21 per year

[1] FPC preliminarily argues that the Commission lacks jurisdiction to alter pole attachment contracts entered into voluntarily prior to the effective date of Section 224. The Commission, however, has previously determined that it does have this authority and we need not explain the rationale once again. *See First Report and Order in CC Docket 78-144*, 68 FCC 2d 1585, 1591 (1978), *aff'd on recon., Second Report and Order in CC Docket No. 78-144*, 72 FCC 2d 59, 67 (1979) *("Second Report")*, *aff'd sub nom. Monongahela Power Company* v. *Federal Communications Commission*, No. 80-1390 (D.C. Cir., May 15, 1981) *("Monongahela Power")*.

per attachment.[2] They therefore urge us to substitute this lower rate for the $6.51/$7.15 per pole per year rate contained in the contracts and, further, to order appropriate refunds. FPC, by contrast, argues not only that the $6.51/$7.15 rate is reasonable, but that a rate of $9.63 is fully justified under the pole attachment rate formula.

4. Section 1.1409(c) of the Commission's Rules, 47 C.F.R. §1.1409(c), provides that the maximum "just and reasonable" rate for pole attachments is to equal the percentage of the total usable space occupied by the pole attachment times the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole. This rule, expressed as a formula, is as follows:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times (\text{Operating Expenses} + \text{Capital Costs of Poles})$$

In the instant case, the parties' dispute centers on all of these elements.

5. *Total Usable Space and Space Occupied by CATV.* The arguments of the parties regarding usable pole space and space occupied by CATV are substantially identical to those in *Cable Information Services, Inc.* v. *Appalachian Power Company*, 81 FCC 2d 383 (1980) ("*C.I.S.*"). Complainants have used 13.5 feet as the average usable space figure and twelve inches as the space occupied by CATV. These figures comport with the Commission's rules and prior decisions. FPC, on the other hand, argues that the Commission should have adopted an average of 11 feet of usable space per pole rather than 13.5 feet and that the space occupied by CATV should be 52 inches. The Commission rejected arguments supporting these figures in *C.I.S.*, 81 FCC 2d at 385-86.

[2] Pursuant to the agreement, Teleprompter is charged an annual rental rate of $5.50 per pole for the year ending December 31, 1977, $5.74 per pole for 1978, $5.98 per pole for 1979, $6.24 per pole for 1980, $6.51 per pole for 1981, and $6.79 per pole for 1982. Acton is charged $7.15 per pole per year per its contract dated June 16, 1980.

There is no need to repeat the Commission's rationale for using the 13.5 feet and one-foot figures in the rate formula.

6. *Operating Expenses and Capital Costs of Poles.* The final formula element to be determined is operating expenses and capital costs of poles. Although operating expenses and capital costs of poles (also known as "carrying charges") can be expressed directly as dollar amounts, these costs may also be expressed as a percentage of net pole investment. Section 1.1404(g)(9), 47 C.F.R. §1.1404(g)(9). Thus, the operating expenses and capital costs of poles normally are determined from the net cost of a bare pole and the carrying charges attributable to the cost of owning a pole.

7. *Net Cost of Bare Poles.* Complainants, in their initial complaint, calculate FPC's investment per bare pole by using information contained in publicly available documents, such as Respondent's Federal Energy Regulatory Commission ("FERC") Form 1, in order to compute certain elements by which the maximum lawful rate is calculated. Complainants, in order to assess these values, made certain assumptions initially based upon information concerning other carriers similarly located geographically for net investment of bare poles, depreciation, rate of depreciation, total number of poles owned by respondent, and other information associated with carrying charges. In this manner they arrived at a maximum lawful rate of $1.38. This approach was taken because FPC failed to respond to complainants' letters of inquiry.

8. Subsequently, in its Reply and Motion for Leave to File, FPC provided updated and corrected information through December 31, 1981. Based upon this information complainants have corrected their complaint to coincide with the new information and developed a maximum lawful rate of $2.21.

9. FPC, on the other hand, calculates two annual pole attachment rates. The first, determined generally in accordance with this Commission's Reports and Orders (see footnote 1), arrives at a maximum lawful rate per pole of $2.51. The second rate, $10.10, is determined in accordance with FPC's conception of a fair and just rate if complainants owned their own pole system. Since the latter is not the case, we will concern ourselves only with the existing situation which as explained corresponds in form with our previous orders. We then adjust this showing only as necessary to enable us to arrive at the maximum lawful rate.

10. FPC submitted updated figures[3] listing the net cost of a bare pole at a figure of $95.91. Complainants take issue with this figure but offer no substantive alternative. We see no problem with FPC's figures and therefore accept its calculation of $95.91.

11. *Carrying Charges.* This brings us to the dispute over carrying charges. FPC originally responded to complainants' inquiries with a 33.70% carrying charge. In their reply, complainants, while not submitting an alternative figure, question FPC's methodology for adjustment of its gross administrative carrying charge as well as its gross tax charges for application to net investment by multiplying the gross charge by the rates of gross to net pole investment. Complainants suggest that these charges are related to the entire plant and should be adjusted only by the ratio of gross to net plant. In addition, complainants allege that FPC calculation [*sic*] of the gross tax component of the carrying charge is inconsistent with the Commission's

[3] FPC submitted a motion for leave to file amendments to its original response filed on January 21, 1981. The amendments updated statistical information as well as the income tax carrying charge calculations. Additional legal arguments were also made. Complainants object to this motion. Because the filing does contain important new information and we seek to have the most recent, accurate data available in the record, we will accept the filing.

methodology in *Teleprompter of Fairmont, Inc.* v. *Chesapeake & Potomac Telephone Co. of West Virginia*, 79 FCC 2d 232 (1980), *aff'd on recon.* 85 FCC 2d 243 (1981).

12. We find FPC's approach in calculating the ratio of gross pole investment to net pole investment to be reasonable. That figure was derived as follows:

$$\frac{\text{Gross Pole Investment}}{\text{Net Pole Investment}} = \frac{\$88,975,480}{\$59,647,898} = 1.4917$$

13. FPC's other carrying charges must be adjusted to properly compute the maximum carrying charge. Those to be adjusted include maintenance expense, administrative expense, and federal, state, other taxes [*sic*]. All figures used are from FPC's FERC Form 1 for 1980. The maintenance expenses component equals the FERC account 593 divided by the corresponding gross investment in account 364 (Poles, Towers, and Fixtures), account 365 (overhead conductors and devices), and account 369[4] (Services), then multiplied by the gross pole/net pole investment conversion ratio of 1.4917. FPC has failed to include account 369 in its calculation. By including account 369, the Maintenance Expense rate for gross investment changes from 6.35% to 4.48%. Multiplying 4.48% × 1.4917 we arrive at a maintenance expense rate for net investment of 6.69%:

$$\frac{\text{FERC 593}}{\text{FERC 364 + 365 + 369}} = \frac{\$10,581,432}{\$88,957,480 + \$77,537,356 + \$69,424,614} =$$

$$\frac{\$10,581,432}{\$235,937,450} = \begin{matrix} 0.0448 \\ 4.48\% \end{matrix} \text{ or Maintenance Expense for Gross Investment}$$

$4.48\% \times 1.4917 = .0669$ or 6.69% Maintenance Expense for Net Investment

14. FPC, in calculating administrative expense, included the total administrative expense of $29,943,156. The

[4] *See* United States of America, Federal Power Commission, *Uniform Systems of Accounts* Prescribed for Public Utilities and Licensees.

accounts we accept for purposes of calculating General and Administrative expense are the accounts that appear to have amounts related to pole attachments, based upon an examination of the Uniform System of Accounts for Electric Companies. These accounts are Administrative and General Salaries ($8,088,229), Office Supplies and Expenses ($3,459,402), Administrative Expenses Transferred [Credit] [$29,030] and Regulatory Commission Expenses ($305,316); giving a total allowable Administrative Expense of $11,753,917. By dividing the total allowable Administrative Expense by the Gross Plant Investment of $2,078,396,138, we arrive at a 0.56% Administrative expense rate for Gross Investment. Multiplying this number by the gross plant/net plant investment conversion ratio of 1.297,[5] we obtain the maintenance expense component of 0.726%. FPC has improperly used the gross to net pole investment ratio. However, G & A and Taxes relate to total electric operations. Therefore, the ratio of Gross Plant to Net Electric Plant in service is the proper calculation.

15. The final components for carrying charges which require adjustments are the federal, state and other taxes. FPC has used standard levelized fixed charge rate equations for calculation of its taxes. Consistent with the Commission's practices, we will use the actual taxes paid by FPC multiplied by the gross plant/net plant investment conversion ratio of 1.297 to determine this portion of the carrying charge.

$$\text{Taxes} = \frac{\text{Ad Valorem Taxes} + \text{Federal Income Taxes} + \text{State Income Taxes}}{\text{Gross Plant Investment}} \times 1.297$$

$$\frac{\$53,373,765 + (-\$26,867,971) + \$1,123,825}{\$2,078,396,138} \times 1.297 = 1.72\%$$

[5] To obtain the gross plant/net plant investment conversion ratio:

$$\frac{\text{Gross Electric Plant}}{\text{Net Electric Plant}} = \frac{\$2,078,396,138}{\$2,078,396,138 - \$475,940,294} = 1.2970$$

16. The total carrying charges, 25.026%, equal the sum of the individual components derived above plus those of FPC's which did not require adjustment, shown as follows:

	% of Net Pole Cost
Return (Cost of Capital)	9.31%
Maintenance to expense	6.69%
Administrative Expense	0.726%
Depreciation	6.79%
Fed/State & Other Taxes	1.72%
TOTAL	25.236%

Therefore, the maximum carrying charge in this instance, after all adjustments, is 25.236%.

17. *Maximum Rate.* By inserting the values developed in paragraphs 5-16 into the formula, as follows, we calculate that the maximum rate per attachment is $1.79:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times \frac{\text{Cost of a}}{\text{Bare Pole}} \times \text{Carrying Charges}$$

$$\text{Maximum Rate} = \frac{1 \text{ Foot}}{13.5 \text{ Feet}} \times \$95.91 \times 25.236\% = \$1.79$$

18. Under Section 224 of the Act and our underlying rules, $1.79 per pole attachment per year is thus the maximum just and reasonable rate FPC may charge. As noted, however, FPC has been charging $6.51/$7.15 (see footnote 2) per attachment annually during the period covered by these complaints. The conclusion is inescapable, therefore, that FPC's rates are unjust and unreasonable within the meaning of the Act.

Other Issues

19. Complainants also allege that FPC is attempting to charge them a "one-time rental charge" of $16.50 per anchor and that this charge is unlawful. Complainants also state that the respondent must support any such charge by the same cost justification as prescribed for pole attachments. FPC argues that an anchor attachment is not an "attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility," and the Commission does not have jurisdiction under 47 U.S.C. §224

to pass upon Complainants' challenge of the reasonableness of the utility's anchor attachment rates. We cannot agree. The Commission, under the Pole Attachment Act, Pub. L. No. 95-234, has the authority to challenge the reasonableness of FPC's anchor charges. However, because the record is inadequate on this point, we are unable to reach any conclusive finding at this time. Therefore, at this time we will take no further action in this matter, but rather leave to the parties the problem of settling their differences on unauthorized attachments.

Remedies

20. Where, as here, substantial overcharges are established by the record, a refund of excess payments retroactive to the date of the filing of the complaints, plus interest, is proper. For the same reasons described in *C.I.S.*, we are ordering a refund reflecting the difference between the $1.79 rate and the $6.51/$7.15 rate currently being charged complainants for all payments in excess of the $1.79 rate made since November 13, 1980, and April 13, 1981 (when Teleprompter and Acton filed their complaints), as specified below. See discussion in *C.I.S.*, 81 FCC 2d at 392-93.

21. In addition, the Commission has determined previously that the current interest rate for Federal tax refunds and additional tax payments is the appropriate rate of interest on the overcharges. *See Teleprompter of Fairmont, Inc.* v. *Chesapeake and Potomac Telephone Company of West Virginia, supra.* It has also taken official notice that the Commissioner of Internal Revenue has set a rate of 12 percent per year effective February 1, 1980, thereby increasing the rate from 6 percent. Rev. Rul. 79-365, 79-45 I.R.B. 16.

22. An annual interest rate of 12 percent will then be imposed from the respective dates the complaints were filed until the payment of the refunds by FPC.

ORDERING CLAUSES

23. Accordingly, IT IS ORDERED, pursuant to Sections 0.291 and 1.1401-1413 of the Commission's Rules, 47 C.F.R. §§0.291 and 1.1401-1413, That the complaint of Acton CATV, Inc. d/b/a Brookville Properties Venture and PASCO Associates Venture and Teleprompter Corp. and Teleprompter Southeast, Inc., ARE GRANTED to the extent indicated above.

24. IT IS FURTHER ORDERED, pursuant to Sections 0.291 and 1.1410(a) of the Commission's Rules, 47 C.F.R. §§0.291 and 1.1410(a), That the existing annual rate of $6.51/$7.15 for each pole attachment arising out of the agreement between Florida Power Corporation and Complainants IS TERMINATED, effective upon the release of this Order.

25. IT IS FURTHER ORDERED, pursuant to Sections 0.291 and 1.1410(b) of the Commission's Rules, 47 C.F.R. §§0.291 and 1.410(b), That an annual rate of $1.79 for each pole attachment IS SUBSTITUTED for the existing rate in the contract described in paragraph 2, effective upon release of this Order.

26. IT IS FURTHER ORDERED, pursuant to Sections 0.291 and 1.1410(c) of the Commission's Rules, 47 C.F.R. §§0.291 and 1.1410(c), That Florida Power Corporation SHALL REFUND, within thirty (30) days of release of this Order:

(a) to Teleprompter Corporation and Teleprompter Southeast, Inc., excess payments made since November 18, 1980. These excess payments for which refunds are ordered consist of the difference between the payments made and payments based on the maximum lawful annual rate of $1.79 per attachment. This refund shall consist of the excess payments included in the first payment (prorated from November 18, 1980) and all subsequent payments made after November 18, 1980.

(b) to Acton CATV, Inc. d/b/a Brookville Properties Venture and PASCO Associates Venture, excess payments made since April 13, 1981. These excess payments for which refunds are ordered consist of the difference between the payments made and payments based on the maximum annual rate of $1.79 per attachment. This refund shall consist of the excess portions included in the first payment (prorated from April 13, 1981) and all subsequent payments made after April 13, 1981.

27. IT IS FURTHER ORDERED, That the refunds shall bear interest at an annual rate of 12 percent simple interest from the filing dates of the complaints, until the date of full payment to each complainant.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Illegible for

Jack D. Smith
Acting Deputy Chief (Operations)
Common Carrier Bureau

APPENDIX E

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

Nos. 84-3683,
84-3904

FCC Nos. PA-81-0008, PA-81-0023 & PA-82-0005

FLORIDA POWER CORPORATION,

Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

Petitions for Review of an Order of the
Federal Communications Commission

Before RONEY and FAY, Circuit Judges, and
DUMBAULD*, District Judge.

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*Honorable Edward Dumbauld, U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

JUDGMENT

These causes came on to be heard on the petitions of Florida Power Corporation for review of an order of the Federal Communications Commission, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that upon the petitions for review, the order of the Federal Communications Commission in these causes be, and the same are hereby, VACATED;

It is further ordered that respondent pay to petitioner, the costs on appeal to be taxed by the Clerk of this Court.

Entered: October 8, 1985
For the Court: Spencer D. Mercer, Clerk

By: /s/ Illegible
Deputy Clerk

ISSUED AS MANDATE: NOV 21 1985

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 84-3683
84-3904

FLORIDA POWER CORPORATION,

Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

Petitions for Review of an Order of the
Federal Communications Commission

ON PETITIONS FOR REHEARING AND
SUGGESTIONS FOR REHEARING EN BANC

(Opinion October 8, 1985, 11 Cir., 1985, ____ F.2d ____)

(November 12, 1985)

Before RONEY and FAY, Circuit Judges, and DUMBAULD*, District Judge.

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*Hon. Edward Dumbauld, U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

PER CURIAM:

(XX) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ PETER T. FAY
United States Circuit Judge

APPENDIX G

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3683
No. 84-3904

Florida Power Corporation,
Petitioner,

v.

Federal Communications Commission,
And United States of America,
Respondents,

Group W Cable, Inc.,
National Cable Television Association, Inc.,
Cox Cablevision Corporation, *et al.*,
Intervenors.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF GROUP W CABLE, INC., NATIONAL CABLE TELEVISION ASSOCIATION, INC., AND COX CABLEVISION CORPORATION

Notice is hereby given that Group W Cable, Inc., National Cable Television Association, Inc., and Cox Cablevision Corporation, intervenors aboved-named, hereby appeal to the Supreme Court of the United States from the judgment entered in this action on October 8, 1985, vacating an order

released by the Federal Communications Commission on September 28, 1984. Petitions for rehearing and suggestions for rehearing en banc were denied November 12, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1252.

Respectfully submitted,

/s/ BRENDA L. FOX

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December 10, 1985

APPENDIX H

POLE ATTACHMENT ACT

Pub. L. No. 95-234, § 6, 92 Stat. 33, 35-36 (codified as amended at 47 U.S.C.A. § 224 (West Supp. 1985))

§ 224. Pole attachments

(a) Definitions

As used in this section:

(1) The term "utility" means any person whose rates or charges are regulated by the Federal Government or a State and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates,

terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) Within 180 days from February 21, 1978, the Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that—

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of cable television services, as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter—

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) Determination of just and reasonable rates; definition

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.